

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

MICHAEL W. TOMPKINS,  
Appellant,

v.

DEPARTMENT OF THE NAVY,  
Agency.

DOCKET NUMBER  
DC-0752-95-0413-I-1

DATE: JAN 14 1999

Irving Kator, Esquire, Kator, Scott & Heller, Washington, D.C., for the  
appellant.

Phillip Boyer, Indian Head, Maryland, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the July 18, 1995 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DISMISS the appeal on grounds of judicial estoppel.

**BACKGROUND**

¶2 This is an adverse action appeal in which the appellant alleged that his retirement on disability in 1975 constituted a removal action because it was the result of agency misinformation. In his initial decision, the administrative judge dismissed the appeal for

lack of jurisdiction without conducting a hearing, finding that the appellant had failed to make a nonfrivolous allegation that his retirement resulted from agency misinformation.

¶3 This appeal was filed after the appellant received an adverse initial decision in a related appeal, *Tompkins v. Office of Personnel Management*, MSPB Docket No. DC-831E-95-0129-M-1 (the retirement appeal). The retirement appeal concerned the action of the Office of Personnel Management (OPM) which terminated the appellant's disability retirement benefits in 1994 on the basis that he no longer suffered from schizophrenia. The appellant challenged that action, contending that he had never suffered from schizophrenia, and that his application for disability retirement had been based on a knee condition. The Board found that: (1) the appellant filed the disability retirement application on the basis of a knee condition and believed that this had been the basis on which disability benefits were approved; (2) OPM's predecessor, the Civil Service Commission, had approved disability benefits on the basis of a mental condition; (3) the determination by the Civil Service Commission of a disabling mental condition was not binding on the appellant, but the appellant was not entitled to reinstatement of his disability retirement on the basis of his knee condition because no administrative agency had ever found that he was disabled on that basis; and (4) the appeal must be remanded to OPM for a determination of whether the appellant was entitled to disability retirement in 1975 on the basis of his knee condition. *Tompkins v. Office of Personnel Management*, 72 M.S.P.R. 400 (1996).

¶4 In a footnote in its decision in the retirement appeal, the Board observed that a favorable decision by OPM would in all likelihood render moot the second-filed adverse action appeal against the Department of the Navy. 72 M.S.P.R. at 403 n.2. The Board stated that it therefore would hold the adverse action appeal in abeyance pending the outcome of the retirement appeal. *Id.*

¶5 On remand, OPM found that the appellant was not entitled to disability retirement on the basis of a knee condition. In an initial decision dated December 15, 1997, however, an administrative judge, having found that the appellant "met his burden of proving that

he was entitled to disability retirement in 1974 because of his knee condition,” ordered OPM “to grant the appellant’s application for disability retirement filed June 1, 1974.” *Tompkins v. Office of Personnel Management*, MSPB Docket No. DC-831E-97-0918-I-1, slip op. at 7. This decision became the Board’s final decision when the deadline for petitioning the Board for review passed without a petition being filed. *See* 5 U.S.C. § 7701(e)(1).

¶6 In light of the appellant’s success in the retirement appeal, the Board issued an order directing the appellant to show cause why the adverse action appeal should not be dismissed as moot.

### ANALYSIS

¶7 In *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 195 (1996), we noted that a pending appeal is moot when the appellant has otherwise obtained all the relief that he could obtain from a favorable decision by the Board, so that the appellant is left with no legally cognizable interest in the outcome of the appeal. Unlike the cases cited in *Currier* which were rendered moot by a decision in another case which granted all the relief sought in the mooted case, the Board’s decision in *Tompkins v. Office of Personnel Management* has not provided the appellant the relief of reinstatement and back pay which he is seeking here.

¶8 The doctrine of judicial estoppel, however, bars the appellant from now seeking relief from an alleged constructive removal. Judicial estoppel preserves the integrity of the judicial process by precluding a party from contradicting a tribunal’s determination in another proceeding when the determination was based on the position taken by the party in that case. *Teledyne Industries, Inc. v. National Labor Relations Board*, 911 F.2d 1214, 1217-18 & n.3 (6th Cir. 1990). The doctrine is one that is appropriately applied to decisions in administrative adjudications, *cf. Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993), and it is plainly applicable here. The Board’s decision in *Tompkins v. Office of Personnel Management* accepted the appellant’s contention that he was physically unable to perform his duties and entitled to retire on disability at the

time of his separation. As a result, that decision bars the appellant from making the contrary contention in this case that his separation was due to agency misinformation and should be reversed as a constructive removal. Because the appellant has sought and obtained a decision that he was entitled to be retired on disability, he is judicially estopped from contending this retirement was a constructive removal.

¶9 The object of an adverse action appeal is necessarily to undo the adverse action—in this instance, the appellant’s alleged removal by the Department of the Navy. If successful in this appeal, the appellant’s remedy would be reinstatement to employment at the Department of the Navy. Such employment is obviously and inherently inconsistent with receiving a disability retirement annuity. Until the appellant’s retirement appeal was resolved, he could plead in the alternative that his retirement on disability constituted a removal action. *Cf.* Fed. R. Civ. P. 8(e) (permitting a party to plead as many separate claims or defenses as the party has regardless of consistency). Now that there is a final decision determining that the appellant is entitled to, and must be awarded, disability retirement benefits, he can no longer maintain a claim that his disability retirement constituted an unwarranted removal action.

¶10 That OPM claims to have doubts as to the appropriate relief to be provided the appellant as a result of the retirement appeal does not alter the fact that a definitive and final decision has been made by the Board that the appellant is entitled to disability retirement benefits. If OPM is not in compliance with the Board’s final order in the retirement appeal, our regulations provide the appellant a remedy—a petition for enforcement under the provisions of 5 C.F.R. §§ 1201.181 to .183. He is not entitled, however, to maintain an adverse action appeal that is inconsistent with the relief ordered by the Board in the retirement appeal.

¶11 Accordingly, we find that the present appeal must be dismissed on the basis of judicial estoppel in light of the Board’s final order in the retirement appeal.

ORDER

¶12 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING  
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

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Robert E. Taylor  
Clerk of the Board

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

*Michael W. Tompkins v. Department of the Navy*

Docket No. DC-0752-95-0413-I-1

Although I join the majority's decision, I write separately to express my understanding concerning the limits of what we have decided. First, in my view, judicial estoppel should be applied only to an administrative decision that was reached in an adversary adjudication such as the Board's decision in the appellant's disability retirement appeal. The Board should not give judicial estoppel effect to a decision by the Office of Personnel Management on a retirement application because such a decision is not the result of a true adversary process. Second, I would distinguish from this case a judicial or administrative finding that an appellant is entitled to disability retirement, to the extent that such a finding is based on the agency's certification that no accommodation of the appellant's disability is possible. Judicial estoppel should not bar that individual from continuing to challenge his or her removal on the basis of the agency's failure to provide reasonable accommodation. There is no inconsistency on the part of one who acknowledges having a disability both receiving a retirement annuity on the basis of the agency's determination that the disability cannot be accommodated, and at the same time challenging that determination in an appeal seeking reinstatement on the basis that accommodation is possible, and nothing in our opinion above indicates otherwise.

Beth S. Slavet, Vice Chair

JAN 14 1999